

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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FORD MOTOR COMPANY, a  
corporation,  
Plaintiff and Appellant,  
vs.

BENJAMIN E. BOONE, INC., a  
corporation; BENJAMIN E.  
BOONE and BENJAMIN E.  
BOONE, INC., a corporation;  
D. R. BOONE and NORA  
CARLYLE, a co-partnership,  
doing business as Benjamin E.  
Boone & Co.,  
Defendants and Appellees.

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## Brief of Defendants and Respondents

Upon Appeal from the United States District  
Court for the District of Oregon.

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Filed

MAY 1911

F. D. Monckton,



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### STATEMENT.

The Ford Motor Company, complainant, manufactures at Highland Park, Michigan, vast numbers of a machine popularly known as "Fords"; a

term which complainant claims as a trade-name. The public has applied to it another name, to-wit: that of "flivvers," under which it is as equally well known, but we do not understand that complainant lays claim to that.

These "Fords" it transports in interstate commerce in an unassembled condition to various branch factories throughout the United States, where the mechanism is placed together, tested by the branch factories and in turn shipped to practically every city, town and hamlet of the United States. The company designates one or more persons in each locality to whom it ships its products for sale. It is the universal practice to accompany the bills-of-lading with drafts covering 85% of the retail list price of the car. The local dealer before receiving the machines from the common carrier pays the draft and freight charges. The eighty-five per cent referred to is all that the Ford Motor Company ever receives for its products. The fifteen per cent remaining becomes and is the property of the dealer.

Notwithstanding these facts, the company, by a system of contracts, which it alleges is in universal use, and which are hereinafter discussed in detail, endeavors to control not only the price which it shall receive for its products, and the persons to whom it sells the same, but also the price at which the dealer shall dispose of the cars, to the public, and the persons to whom and the places where he shall market the same.

From the moment that the car leaves the factory of the complainant corporation, that corporation ceases to have any responsibility or obligation with regard thereto, except for defective workmanship and materials, and then only if in its opinion the same were defective.

The defendants are engaged in the general automobile business in the city of Portland, Oregon, are not agents or dealers of the company, and had the temerity to sell Ford cars to the public for \$25.00 less than the price complainant had established as its retail price for new cars.

Complainant, after having made an unsuccessful attempt to enforce its contract system in the state courts of Oregon, brought this suit, complaining that for the purpose of unfairly diverting plaintiff's trade and affording an unfair competition, the defendants have been guilty of the following actions, which it claims are false, fraudulent, unfair and misleading:

(a) The defendants maintain across their place of business the words, "Benjamin E. Boone & Co., automobiles," also the word, "FORDS." (It is not claimed that the defendants are not selling those devices, or that they are selling any other device under the trade-name of plaintiff.)

(b) They have printed certain posters, which have been placed on cans containing automobile oil, bearing what is designated as the "winged pyra-



mid" with script words, "Ford" thereon, imitative of plaintiff's trade-mark, followed after a description of the contents of the can, by the words, "Benjamin E. Boone & Co., Ford Agents, Portland, Oregon." (It is not alleged or claimed that the trade-mark of plaintiff was ever by it applied or registered to oil products, or that defendants were claiming to be agents of the Ford Motor Company.)

(c) They have represented to prospective purchasers of Ford cars that defendants were Ford agents, that they obtained Ford cars in quantity from plaintiff's main factory at Highland Park, Michigan, or from the **duly authorized** factory branch at Portland, Oregon, or other factory branches elsewhere. (It is not alleged that defendants were "agents" for the sale of Ford cars, or that they are not obtaining such cars from some one of the places mentioned, or that they are selling some other product under the name of the trade-name of plaintiff.)

(d) That they have procured certain persons having contractual relations with plaintiff, at Woodburn, Oregon, Kelso, Washington, and other places to breach their contracts with plaintiff.

(e) They caused to be printed in the telephone directory at Portland the following: "Boone, Benj. E. & Co., Ford Auto Agency, 514 Alder St., Main 3966." (That defendants did not and do not claim to be agents of the plaintiff corporation is evident from plaintiff's own exhibit "D," (Abstract of Record, 39), a public advertisement in the "Oregon

Journal," where the defendants, in large type, expressly disclaim such relationship. "We are NOT agents of the Ford Motor Co. Our Territory is Unlimited.")

(f) That defendants advertised for sale new Ford automobiles, alleged to have been obtained from agents of plaintiff, at the price of \$467.50, which is greatly below the price at which plaintiff and its agents are permitted to sell said automobiles. (This is the REAL question at issue. SHALL THE FORD MOTOR COMPANY BE PERMITTED TO USE THE COURTS OF THE UNITED STATES TO MAINTAIN THE PRICE OF ITS DEVICE?)

The system of contracts referred to have been under the examination of six different judges of the state courts of Oregon, in addition to being construed by the District Court of the United States for the District of Oregon, and in each instance, have been held invalid and illegal.

## **POINTS AND AUTHORITIES.**

### **I.**

\*The complaint does not allege that the amount in controversy between plaintiff and defendants exceeds the sum of \$3,000.00 exclusive of interest and costs. The Federal Courts therefore have no jurisdiction.

Mayer vs. Cohrs, 188 Fed. 443.

Olman vs. City of New York, 168 Fed. 953, 961.

Dupree vs. Leggette, 140 Fed. 776.

Battle vs. Atkinson, 115 Fed. 384, 385.

Wines vs. Cobb Real Estate Co., 128 Fed. 198.

## II.

The complaint affirmatively shows that plaintiff has no means of estimating in money the damage done to it by the defendants, or how much it will, in future, suffer, and that there is no known measure of damages capable of ascertaining the amount of money it will lose by reason of defendants' acts.

## III.

The infringement of patent rights is not pleaded, and the alleged rights of complainant as patent proprietors is not involved.

Brown vs. Keene, 8 Peters, 110, 114; also

Robertson vs. Cease, 97 U. S. 646, 648, 649;

Anderson vs. Watt, 138 U. S. 698, 702, 703;

Continental Ins. Co. vs. Rhoads, 119 U. S. 237, 239;

Hanford vs. Davies, 163 U. S. 273, 279.



## IV.

The contract is unilateral, lacking in mutuality, and cannot be enforced. The company is under no obligations to do anything. It does not promise to sell, or furnish cars, parts, accessories, or to make its "distributors," or "agents" the sole or only individuals wholesaling or retailing its products in the given community.

Ellis vs. Dodge Bros., 237 Fed.

1 Page on Contracts, Par. 303, 304.

## V.

The contract is void and unenforceable as to its provisions relative to fixing retail prices, territory, and persons to whom the wholesaler and retailer may sell Fords.

Ford Motor Co. vs. Union Motor Sales Co.,  
225 Fed. 373.

## VI.

.. The contract is an adroit attempt to avoid the consequences of the following decisions of the federal courts, and to cover up the real nature of the transaction between the plaintiff and the whole-sale and retail dealers in its products.

John D. Park vs. Hartman, 153 Fed. 24, 12  
L. R. N. S. 135.

Bobbs-Merrill Co. vs. Straus, 210 U. S. 339,  
52 L. Ed. 1041.

Dr. Miles Medical Co. vs. John D. Park &  
Sons, 220 U. S. 373.

Standard Sanitary Mfg. Co. vs. U. S., 226  
U. S. 20.

Bauer & Cie vs. O'Donnell, 229 U. S. 1, 57  
L. Ed. 1041.

Straus vs. Am. Pub. Assn., 231 U. S. 222, 58  
L. Ed. 192, L. R. A. 1915 A. 1099.

Straus vs. Victor Talking Machine Co., No.  
374 October Term 1916, decided April 9,  
1917.

## VII.

Rights conferred by patents are indeed definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained.

Standard Sanitary Mfg. Co. vs. U. S., 226 U.  
S. 20, 49.

## VIII.

The term vend as used in both copyright and patent statutes has the same meaning, but that right, made exclusive by law, does not confer the right to fix the re-sale price of the particular patent or book copyrighted.

Straus vs. Am. Pub. Assn., 231 U. S. 222, 58  
L. Ed. 192.

Bauer & Cie vs. O'Donnell, 229 U. S. 1, 57  
L. Ed. 1041.

## IX.

A scheme of contracts perpetuating monopoly and in restraint of trade under either copyright or patent laws, cannot escape the prohibition of the Sherman act.

Straus vs. Am. Pub. Assn., **supra**.

Bauer & Cie vs. O'Donnell, **supra**.

## THE CASE OF DR. MILES MEDICAL CO. GOVERNS

The complainant cannot prevail. The contract which it seeks to protect has been condemned by the Supreme Court in numerous cases commencing with that of,

DR. MILES MEDICAL CO. vs. PARK &  
SONS, 220 U. S. 373,

as being in restraint of trade, and creating a monopoly.

With each decision ingenious counsel have attempted by various subterfuges to avoid the force and effect of the ones preceding it, but with one exception, that of the case of *Henry vs. Dick Co.*, 224 U. S., the Supreme Court of the United States has insisted that words cannot be permitted to conceal thought, desire and intention, and that the spirit of the contract must be the test and not its verbal adornments.

We shall not discuss the cases referred to by counsel in their brief at length, and shall not attempt to analyze the earlier cases, or those in nisi prius courts, or even in courts of appeal, rendered in the interim when the broad doctrines of law were being developed.

We take this course not with any feelings of disrespect for counsel, for it has been a very real pleasure to follow and study their very able pre-

sentation of the case, but because the highest tribunal of the land has by its decisions, gradually cleared the field of doubt and vexation which surrounded the question of the rights of manufacturers of both patented and unpatented goods, and of copyright proprietor to control the re-sale price of their products, and enunciated that as to all goods, the patentee, copyright proprietor and manufacturer may determine the price which they receive for their product, and even limit its use, but when once they have received the consideration asked, or granted full license to use, they have no further right of control, either by contract license or notice.

In the *Dr. Miles Medical Co.* case the company complained that the defendant knew of its system of contracts, but notwithstanding such knowledge had procured the complainant's goods by inducing its retail agents to violate their contracts, and "prayed for an injunction restraining the defendant from inducing or attempting to induce any party to any of the said 'wholesale or retail agency contracts,' to 'violate or break the same, or to sell or deliver to the defendant, or to any person for it' the complainant's remedies," from procuring or attempting to procure in any way any of these remedies from wholesale or retail dealers who had executed the contracts; from advertising, selling or offering for sale the remedies obtained by any of the described means at less 'than the established retail price thereof,' or to dealers who had not entered into contracts with the complainant; from



in any way obliterating, mutilating, removing or covering up the labels and cartons upon the bottles containing the remedies, and from making sales without such labels and cartons, and the letterpress and numerals thereon, being intact. There was also a prayer for an accounting." 220 U. S. 382.

It would be difficult to imagine a case wherein the ultimate facts were more like those in the case at bar, or where the relief sought was so similar.

In that case, as in this, counsel for the complainant with force and no small amount of ingenuity, urged that the contract was one merely of agency and bailment, that the goods were not sold but merely consigned, that a manufacturer had the right to dictate to his agents the price at which they should sell, that the owner of consigned goods was at perfect liberty to bind his consignee to sell the same for him at a certain minimum price, that one who maliciously contrived to have such agents, bailees and consignees breach their contracts with the manufacturer was guilty of a wrong from the continuance of which a court of equity would enjoin him.

These general propositions the Supreme Court admitted without argument, but rendered them totally inapplicable by approving the findings of the Circuit Court of Appeals, that the contract was merely "an effort to disguise the wholesale dealers in the mask of agency, upon the theory that in that character one link in the supression of the 'cut rate'

business might be regarded as valid,, and that under this agreement the jobber must be regarded as the general owner, and engaged in selling for himself and not as a mere agent of another. 90 C. C. A. 581, 164 Fed. 805."

The Court further quoted with approval the opinion of Mr. Justice Lurton in the opinion of the Circuit Court of Appeals in the case of,

JOHN D. PARK & SONS CO. vs. HARTMAN, 12 L. R. A. N. S., on page 147, 82 C. C. A. 158, 153 Fed. 24, 42,

as follows:

"The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. IF THESE CONTRACTS LEAVE ANY ROOM FOR THE USUAL PLAY OF COMPETITION BETWEEN THE DEALERS IN THE PRODUCT MARKETED BY COMPLAINANT, IT IS NOT DISCOVERABLE. Thus

a combination between the manufacturer, the wholesalers, and the retailers, to maintain prices and stifle competition, has been brought about."

On pages 34 and 35 of their interesting "argument book," counsel, with remarkable temerity and a refreshing disregard of consequences, state:

"Plaintiff has invoked a rule that is said in *Dr. Miles Medical Co. vs. Park*, 220 U. S. 394, 55 L. Ed. 513, to be 'the established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other, and that, in the absence of an adequate remedy at law, equitable relief will be granted.' "

But in invoking that rule, they necessarily invoke the lightning upon their heads, for in that same case, the Court holds that the contract referred to is invalid, is illegal, is an unlawful restraint of trade and competition, and that a court of equity will not grant relief to complainants who ground their prayer upon such contracts.

THERE IS NO MATERIAL DIFFERENCE BETWEEN THE CONTRACTS OF THE DR. MILES MEDICAL COMPANY, AND THE CONTRACTS OF THE FORD MOTOR COMPANY.

Every vice condemned in the system "adroitly" concocted by the worthy manufacturers of "Peruna" exists in like degree, but adorned with every

refinement and improvement that the mental agility and astuteness of learned counsel can suggest, in the "Limited and Sub-Limited Agency" contracts of the manufacturers of the humble but ubiquitous "flivver." In addition the Ford Motor Company is bolder than the philanthropic doctor who offered the solace of Peruna to the world; for when the ultimate consumer had paid him all that was asked, he was willing that such consumer should re-sell his bottle, or such portion of as might remain to whomsoever he pleased, having in mind, no doubt, the needs of the thirsty in prohibition communities. Not so with complainant in the case at bar. The bill of sale signed by the company, which, we understand, is the intellectual child of one of counsel, attempts to limit the title conferred upon the purchaser by the company's bill of sale.

"First party shall retain all and complete title to each automobile until actual bill of sale, signed and executed by first party, has been delivered to the vendee, WHO SHALL ONLY BE A USER; that is one who has purchased for immediate use and NOT FOR RE-SALE the Ford automobile, at full advertised list price, plus freight and delivery charges, and said United States tax or excise, if any, and without rebate, donation or drawback of any character whatsoever. And any attempt to sell or dispose of or deliver any Ford automobile AT LESS THAN SUCH PRICE SHALL BE UTTERLY VOID AND SHALL PASS NO TITLE WHATSOEVER."

Again—

“and it is agreed that the sale and use of said automobiles as delivered to the third party are restricted according to the terms of this agreement of agency, and that no license to handle or use said automobiles under such patents and applications, except strictly in accordance with the terms and conditions of this contract, is given; that third party’s right to handle and deliver said automobiles embodying said patents and inventions, is restricted and limited by this contract in its terms, and that NO PERSON SHALL ACQUIRE THE RIGHT TO USE SAID AUTOMOBILE OR TO OWN THE SAME IF THERE BE ANY VIOLATION OF THE TERRITORIAL OR PRICE RESTRICTIONS SET FORTH HEREIN, AND ANY SUCH VIOLATION SHALL CONSTITUTE AN INFRINGEMENT OF EACH AND EVERY OF SAID PATENTS, APPLICATIONS AND INVENTIONS.”

CONTRACT, par. 27.

Conceive of the predicament of the unfortunate purchaser who, having bought one of complainant’s cars, is for some reason unable to put the same to “immediate use,” and who may, by the exigencies of life, desire to rid himself of his luckless venture. If he sells the car, he violates complainant’s alleged patent rights, subjects himself and his purchaser to infringement suits, and is himself liable to his purchaser for damages occasioned by his failure to give good title. Or perhaps in his innocence he makes



a trip away from his place of residence, and while away purchases a car from one of complainant's "Sub-limited Agents," who makes the sale despite his knowledge that the purchaser does not live in the "agent's" territory, again this corporation, which lives and breathes to perpetuate and advertise, the fads and fancies of the philanthropic Henry, steps in, claims the car as its own, robs the purchaser of both car and money, sues for infringement of the alleged patents, and subjects him to harrassing and vexatious litigation.

In view of these provisions alone, the court would be amply justified in holding with Mr. Justice Clarke in,

STRAUS vs. VICTOR TALKING MACHINE COMPANY, *supra*,

"The scheme of distribution is not a system designed to secure to the plaintiff and to the public a reasonable use of its machines, within the grant of the patent laws, but is in substance and in fact a mere price-fixing enterprise, which, if given effect, would work great and widespread injustice to innocent purchasers, for it must be recognized that not one purchaser in many would read such a notice, and that no one in a much greater number, if he did read it, could understand its involved and intricate phraseology, which bears many evidences of being framed to conceal rather than to make clear its real meaning and purpose."

That the court may make a ready comparison of the provision of contract of the Dr. Miles Medical Company, with that of the complainant we have attempted to compile in parallel columns a **resume** of their essential provisions, and submit the following:

**DEADLY  
PARALLEL**

# DEADLY

## DR. MILES MEDICAL CONTRACT.

1. Wholesaler termed "Distributor."  
Retailer termed "Retail Agent."
2. Company appoints both wholesaler and retailer of its products.
3. Company's products are "consigned" and not sold.
4. Title remains in company until sale according to contract.
5. Consigned goods unsold at time of cancellation of contract to be returned to company.
6. Freight to be paid by consignee.
7. Consignee to sell only to designated retail agents.
8. Consignee to account and pay to Company proceeds of all sales.

# PARALLEL

## FORD MOTOR CO. CONTRACT.

1. Wholesaler termed "Limited Agent."  
Retailer termed "Sub-Limited Agent."  
See Contract, par. 1 and Preamble.
2. Company appoints both "Limited" and "Sub-Limited Agents." See Contract, par. 45, and Preamble.
3. Company's cars are "consigned," not sold. See par. 3 of Contract.
4. Title remains in company until sold according to contract. See paragraphs 12 and 27.
5. Unsold cars to be returned on cancellation at the **OPTION** of company. See Contract, par. 47.
6. Freight, crating, taxes, insurance, to be paid by consignee. Contract, par. 11.
7. Consignee to sell to "users" only in certain territory, and not for re-sale. Contract, par. 3, 4 and 5.
8. Must sell for cash only, and if for anything else, must remit cash to company. Contract, par. 7 and 38.



9. Consignee to deduct commissions.
10. Advances to be repaid to consignee on cancellation of contract.
11. Consignee guarantees payment on goods sold.
12. Notwithstanding payment of advances title remains in Company until actual sale as provided in contract.
13. Consignee to furnish monthly statement of stock of goods.
14. Failure so to do a ground for cancellation, and return of goods consigned.
15. Company will give all goods a number, consignee must make report of disposition of each dozen or fraction of dozen, specifying such numbers, address and name of persons to whom sold.

9. Company will after payment by purchaser allow consignee commission of 15% of list price. Contract, par. 28.
10. Advances to be returned at option of company if it retakes goods. Contract, par. 47.
11. Consignee pays in advance for all goods "consigned," and guarantees to "arrange sales" for all goods consigned, and if he fails company keeps his "advances." He further agree to take a certain number each year. Contract, par. 10, 22 and 40.
12. Company retains title until issuance of bill of sale by it to vendee who must be a purchaser for "use" and not re-sale, and who has paid full advertised list price, plus freight and delivery charges, etc. Contract, par. 12 and 27.
13. Consignee each week must give report on all goods **sold** or contracted for by him. Contract, par. 17.
14. Company shall order methods of doing business. Contract, par. 44.
15. Consignee will report number and description of car sold, date of sale, name and address of each purchaser. Contract, par. 17.

16. No commission to be due upon goods sold (a) to unauthorized dealers, (b) upon goods not properly reported, or (c) goods sold at prices less than authorized.
17. Violation of foregoing provision renders contract terminable and unsold goods shall be returned at **option** of proprietor.
18. Company specifies and controls prices at which goods shall be sold.

16. Sales outside of territory, at less than list price shall subject consignee to forfeiture of \$250 for each offense. Contract, par. 5, 8 and 26.
17. Violation of provisions as to sales to other than "users," or outside of territory, or at less than list price, renders contract terminable, and unsold cars shall be returned to company **at its option**. Contract, par. 5, 7 and 47.
18. Company controls and specifies prices at which goods shall be sold. Contract, par. 6, 8, 9, 12, 13, 27, 42 and 47.

The only differences existing between the contract of the manufacturers of Peruna, and that of the Ford Motor Company is that the company insists upon issuing a bill of sale for each automobile it sells.

It is hornbrook law that the making of a bill of sale is not necessary to pass title to personal property. Payment of the purchase price and acceptance of the same, even without delivery passes title as between vendor and vendee.

Th only excuse for this bill of sale is TO EN-  
 ABLE COMPLAINANT TO ENFORCE ITS  
 PRICE RESTRICTIONS, AS BY MEANS  
 THEREOF IT CAN TRACE EACH CAR AND  
 ASCERTAIN TO WHOM IT WAS SOLD,  
 WHERE IT WAS SOLD, AND THE PRICE AT  
 WHICH IT WAS SOLD.

It has, however, another object, that of a cloak of the real transaction. It is admitted that the "agent" before receiving the cars pays to complainant all that complainant ever receives for the same, namely 85 per cent of the list price. The agent pays freight, crating, delivery charges, taxes and insurance. Surely it needs no citation of authority to say that when one receives the price he asks for his product, and delivers it into the hands of the one paying that price, the transaction is a sale, a completed sale, and there remains no right in the manufacturer to further control the disposition of the property, and certainly no right to determine the amount at which it shall be re-sold.



It is apparent therefore that there is no real point of difference between the contracts, and that unless the complaint can establish some right other than that of being the manufacturer of the product to be sold, it has no right to any relief.

Complainant alleges that such right exists by reason that the patent laws grant the privilege to them.

THE COMPLAINT DOES NOT CONTAIN ANY ALLEGATION THAT ANY PATENT HAS EVER BEEN ISSUED UPON COMPLAINANT'S MACHINES.

Counsel states "It appears from the record that Ford automobiles are manufactured under numerous letters patent of the United States and these patents are enumerated in the contract, which is made a part of the complaint. (Transcript, pages 4 and 27.)"

We submit that the record does not show anything of the kind. The only reference to patents is as follows:

"VI.

\* \* \* which automobiles and parts thereof, were invented, developed and fully perfected as the result of years of experience and manufacture and sales thereof by plaintiff, and fully protected by the patent laws." (Abstract of Record, 4.)

## “XI.

That under the agency contract of each of the authorized agents of plaintiff, sample copy of said contract being attached hereto and made a part hereof and marked Exhibit ‘C,’ the agent agrees, etc.” (Abstract of Record, 28.)

The remainder of the paragraph does not relate to or in anywise mention patents or patent rights.

Exhibit “C,” being a sample form of contract, contains a clause reciting that among other things that the first party, (complainant) owns, and Ford automobiles are manufactured under, and embody the following letters patent of the United States, or some of them (setting out a long list of alleged patents).

The allegations in paragraph VI of the complaint are insufficient; every inventor is “protected by the patent laws,” but surely an inventor who sought to prevent an infringement of his invention would be compelled to allege that he had obtained certain letters patent, that those letters patent or the application therefor had been filed and issued prior to the acts complained of (See *Coute vs. Royer*, 155 U. S. 565, 584.) How could the defendants in this case submit an issue on the question raised by the pleading. The complaint does not allege that every allegation of fact in the contract is true, or that such patents were ever issued. The exhibit is offered as a part of the complaint to show the method by which complainant transacted its

business affairs. Defendants could not join issue as to the question of patents in any answer to paragraph XI of the complaint, for the reason that their answer would have to be either an admission or a denial that Exhibit "C" was the **form of contract** used by the Company. An admission that the allegations of paragraph XI are true, i. e., that the company did use such contract forms, would not be an admission that the company in fact owned the patents, that they were still valid and subsisting, that they had ever been issued, or that they were used in the manufacture of a Ford car.

ON THE RECORD AS MADE BY COMPLAINANT'S, THE QUESTION OF PATENT RIGHTS CANNOT BE RAISED.

While not conceding for any purpose that there is any question as to patents involved in this record, the defendants submit to the court that even though every nut, screw, bolt and plate in the machine was manufactured and sold under a valid, subsisting, patent issued out of the United States Patent Office, yet there is no equity in the complaint, and the bill must be dismissed.

Under the provisions of the act of July 8, 1870, (16 Stat. 198, par. 22, c. 230) every patent shall contain "a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery."

The question to be decided is—

DOES THE EXCLUSIVE RIGHT TO VEND CONTINUE TO RESIDE IN THE PATENTEE AFTER HE HAS ONCE EXERCISED IT AS TO A PARTICULAR ARTICLE,—CAN HE CONTROL NOT ONLY THE PRICE WHICH HE WILL RECEIVE FOR IT, BUT ALSO THE PRICE AT WHICH HIS VENDEE SHALL RESELL IT.

The case does not contain any question as to the right to manufacture or the right to use. But we are confronted with the task of determining the extent of the privilege conferred in the “exclusive right to vend” the machine.

This, however, has been settled by the Supreme Court of the United States in the case of

Bauer & Cie vs. O'Donnell, 229 U. S. 1, 13, where it is said:

“So far as the use of the terms ‘vend’ and ‘vending’ is concerned, the protection intended to be secured is substantially identical. The sale of a patented article is not essentially different from the sale of a book. In each case to vend is to part with the thing for a consideration. It is insisted that the purpose to be subserved by notices such as are now under consideration—keeping up prices and preventing competition—is more essential to the protection of patented inventions than of copyrighted articles; and it is said that the copyrighted

article may be and usually is sold for a lump consideration by the author and composer and that he has no interest in the subsequent sales of the work, while the patented inventions require large outlays to create and maintain a market. To some extent this contention may be based upon fact, nevertheless it is well known that in many instances the compensation an author receives is the royalties upon sales of his book or a percentage of the profits, which makes it desirable that he shall have the protection of devices intended to keep up the market and prevent the cutting of prices. **BUT THESE CONSIDERATIONS COULD HAVE HAD LITTLE WEIGHT IN FRAMING THE ACTS.** In providing for grants of exclusive rights and privileges to inventors and authors we think Congress had no intention to use the term 'vend' in one sense in the patent act and 'vending' in another in the copyright law. Protection in the exclusive right to sell is aimed at in both instances, and the terms used in the statutes are to all intents the same. \* \* \* (page 17.) In both instances it was the intention of Congress to secure an exclusive right to sell, and there is no grant of privilege to keep up prices and prevent competition by notice restricting the price at which the article may be re-sold. **THE RIGHT TO VEND CONFERRED BY THE PATENT LAW HAS BEEN EXERCISED, AND THE ADDED RESTRICTION IS BEYOND THE PROTECTION AND PURPOSE OF THE ACT.** This being so, the case is brought within that line of cases in which this court from the beginning has held that a patentee who has parted with a patented



machine by passing title to a purchaser has placed the article beyond the limits of the monopoly secured by the patent act.

\* \* \* 'But in the essential nature of things, when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use, and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly. That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees.' "

It is sought to distinguish this case upon the ground that there was no **contractual** question involved, but merely a **license notice**. Counsel say:

"It as held that where a copyrighted book had been sold and passed out from under the monopoly permitted by law the price could not be kept up by **PRINTED NOTICES** of retail price **ATTACHED TO THE BOOK.**" (Brief, pages 107, 108.)

Counsel are in error, the question of notices placed in the books was not even raised in that case, and we can only account for such statement by the fact that an earlier case, that of **BOBBS-MERRILL vs. STRAUS**, 210 U. S. 339, involved such a state of facts, and involved practically the same parties



as the case of *Strauss vs. Am. Pub. Ass'n.*, 231 U. S. 222.

It being established that the proprietor of a patent has no greater privileges to extend the scope of the term "vend" than has a copyright proprietor, we proceed to the destruction of the second line of defenses of intrenched monopoly.

*STRAUSS vs. AM. PUB. ASS'N.*, 231 U. S. 222.

There, copyright proprietors had entered into an agreement not to sell their copyrighted books to book-sellers who would not agree to maintain for one year the agreed net prices. The plaintiffs, doing business as Macy & Co. of New York City, brought suit in the courts of the State of New York, praying for an injunction restraining the Association from carrying out such an agreement, and asking for damages due to their refusal to sell books to plaintiff.

Originally the conspiracy of the copyright proprietors included uncopyrighted as well as copyrighted books, and the courts of New York held the agreement as to them to be illegal as violating the laws prohibiting monopolies and combinations in restraint of trade. The publishers then eliminated uncopyrighted books from the agreement, but insisted that as to those which were under the protection of the copyright laws, they had a right to make such agreements and combinations, whether

in restraint of trade or not, as might be deemed advisable to them.

The Court of Appeals of New York agreed with them, and refused to grant Straus any relief. An appeal was prosecuted to the Supreme Court of the United States.

The case squarely raises the question to be here decided. Unquestionably, if such a contract were legal, not contravening the laws of the United States, Straus could not complain, and if he could not complain, but himself induced parties to such contracts to violate them, he would come within the prohibition of *Bitterman vs. Louisville & Nashville Ry. Co.*, 207 U. S. 1, 38 L. Ed. 171, as approved in the *Dr. Miles Medical Co. case*, *supra*.

For the foregoing reasons an examination of the Supreme Court's decision should bring us to a conclusion decisive of the case at bar.

Said Mr. Justice Day:

"In the case of *Standard Sanitary Mfg. Co. vs. United States*, 226 U. S. 20, this court had under consideration the effect of the patent statutes upon agreements found to be unlawful under the Sherman Law, and the agreements condemned were held not to be protected as within the patent monopoly conferred by the statute. Replying to the contention as to the protection which the patent laws gave to enter into such agreements, this court said (p. 49):

“ ‘Rights conferred by patents are indeed very definite and extensive, but they do not give any more than any other rights a universal license against positive prohibitions. The Sherman law is a limitation of rights—rights which may be pushed to evil consequences and therefore restrained.’

“So, in the present case, it cannot be successfully contended that the monopoly of a copyright is in this respect any more extensive than that secured under the patent law. No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly, in violation of the specific terms of the Sherman law, which is broadly designed to reach all combinations in unlawful restraint of trade and tending because of the agreements or combinations entered into to build up and perpetuate monopolies.” \* \* \*

“We agree with the Court of Appeals in its characterization of the agreement involved in this case, about which there seems to have been no difference of opinion, except as to the supposed protection of the copyright act. It manifestly went beyond any fair and legal agreement to protect prices and trade as among the parties thereto and prevented, as the Court of Appeals said, when dealing with uncopyrighted books, the sale of books of any kind at any price, to those who were condemned by the terms of the agreement and with whom dealings were practically prohibited.”

It will be remembered that the Supreme Court in the case of

Dr. Miles Medical Co. vs. Park & Sons, 220  
U. S. 373,

held, that a scheme of contracts practically identical with those in the case at bar were in restraint of trade and therefore invalid, when applied to non-patented articles, and as the distinction between copyrighted and uncopyrighted, patented and unpatented is wiped out by the Straus case, it necessarily follows that complainant's scheme of contracts likewise falls under the ban.

A very recent case, that of

STRAUS vs. VICTOR TALKING MA-  
CHINE COMPANY,

decided April 9, 1917, would seem to mark the finish of the last heat in a series of races between astute counsel representing corporations endeavoring by indirection to accomplish that which may not be done openly, and the Supreme Court of the United States.

With all due respect to counsel who drew the contracts of the Ford Motor Company, we must express a belief that their efforts were puny compared to the masterly scheme evolved by attorneys for the Victor Talking Machine Company.

The Victor Talking Machine Company never

mentioned the word sale in its contracts, no one could buy one of its machines, it never sold them to wholesalers, retailers or the public. It "licensed" them for "use" only, it did not exact a price for its machine, but was paid a "royalty" for the license.

Manifestly the "distributors" and "regularly licensed Victor dealers," as they are termed in the Victor contracts, received no title which they could convey, an attempt to convey any title would be void, an attempt to procure them to violate their license contracts and receive less than the "royalty" prescribed would be a malicious wrong against the Victor Talking Machine Company, and manifestly one who obtained machines "covertly" could be restrained from so doing.

Such was the position of the Victor Talking Machine Company, such was the opinion of the Circuit Court of Appeals of Second Circuit, expressed in 230 Fed. 449, but the Supreme Court holds to the contrary:

Says Mr. Justice Clarke:

"It is apparent from the foregoing statement that we are called upon to determine whether the system adopted by the plaintiff was selected as a means of securing to the owner of the patent the exclusive right to use its invention which is granted through the patent law, or whether, under color of such a purpose, it is a device unlawfully resorted to in an effort to profitably extend the scope of its patent at the expense of the general public. Is it



a fact, as is claimed, that this "License Notice" of the plaintiff is a means or agency designed in candor and good faith to enable the plaintiff to make only that full, reasonable and exclusive use of its invention which is contemplated by the patent law or IS IT A DISGUISED ATTEMPT TO CONTROL THE PRICES OF ITS MACHINES AFTER THEY HAVE BEEN SOLD AND PAID FOR?

"First of all it is plainly apparent that this plan of marketing adopted by the plaintiff is, in substance, the one dealt with by this court in *Dr. Miles Medical Co. vs. Park & Sons Co.*, 220 U. S. 373, and in *Bauer vs. O'Donnell*, 229 U. S. 1, ADROITLY modified on the one hand to take advantage, if possible, of distinctions suggested by these decisions, and on the other hand to evade certain supposed effects of them. \* \* \*

"Courts would be perversely blind if they failed to look through such an attempt as this "License Notice" thus plainly to sell property for a full price and yet to place restraints upon its further alienation, such as have been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest. The scheme of distribution is not a system designed to secure to the plaintiff and to the public a reasonable use of its machines, within the grant of the patent laws, but is in substance and in fact a mere price-fixing enterprise, which, if given effect, would work great and widespread injustice to innocent purchasers. \* \* \*

"Convinced as we are that the purpose and



effect of this "License Notice" of plaintiff, considered as a part of its scheme for marketing its product, is not to secure to the plaintiff any use of its machines, such as is contemplated by the patent statutes, but that its real and poorly-concealed purpose is to restrict the price of them, after the plaintiff had been paid for them and after they have passed into the possession of dealers and the public, we conclude that it falls within the principles of *Adams vs. Burke*, 17 Wall. 453, 456; and of *Bauer vs. O'Donnell*, 229 U. S. 1; that it is therefore, invalid, and that the District Court properly held that the bill must fail for want of equity."

That there may be no question that the contract of the Ford Motor Company falls within the scope of *STRAUS vs. VICTOR TALKING MACHINE COMPANY*, let us apply to it the test prescribed by Mr. Justice Clarke.

We have shown heretofore that as the learned judge said, "It is plainly apparent that this plan of marketing adopted by the plaintiff is, in substance, the one dealt with by this (Supreme) court in *Dr. Miles Medical Co. vs. Park & Sons*, 220 U. S. 373, and in *Bauer vs. O'Donnell*, 229 U. S. 1."

The second test prescribed is as follows:

HAS THE FUTURE ANY RISKS FOR COMPLAINANT, AND DOES IT REQUIRE THAT ALL THAT IT ASKS AND RECEIVES FOR EACH MACHINE BE PAID IN FULL BEFORE IT PARTS WITH POSSESSION OF IT?

**The contract provides:**

1. If the agent sells for anything but cash, he does so on his own responsibility, and must remit cash to the company. (Contract, par. 7.)

2. Although the company reserves the right to change the retail list price of its machines, yet it will not rebate to the agent the difference between the 85% of the old price and the 85% of the new, as to those machines "consigned" to him more than thirty days prior to the change. **IMAGINE A BONA FIDE CONSIGNOR ATTEMPTING TO COMPEL HIS CONSIGNEE TO STAND A LOSS OCCASIONED BY THE ACT OF THE CONSIGNOR HIMSELF.** (Contract, par. 9.)

3. The "agent" must advance in cash the full amount that the company ever gets for its cars (85% of the retail list price) **at the time of the consignment of the automobiles to him.** (Contract, par. 10.)

4. Although the cars are the property of the consignor, yet the consignee is compelled to pay the freight, and there is no liability on the part of the company to repay such advances. (Contract, par. 11.)

5. Although the only right of the company under the patent law is to limit the use to which a machine may be put, the complainant while conveying full right to use, **attempts to limit the right of the ultimate consumer to re-sell.** The purchaser,

under his bill of sale, gets no title whatsoever unless he has paid the full list price, plus freight, etc., **without rebate, donation or drawback of any character whatsoever.** (Contract, par. 12.)

6. Although the company claims they do not sell the cars to the "Agents," their own contracts refute the claim. If it were a true consignment, the advances could only be made for the purpose of protecting the consignor against the wrongful acts or embezzlement of the consignee. Under the contract, such advances are not to be returned to the "agent" if the carrier by whom it is shipped at the instance of the company, damages the same, **THE DAMAGE FALLS UPON THE HEAD OF THE AGENT.**" It is stipulated that the first party shall not be liable to the third party for any injury or damage to the automobile after it is once delivered to the carrier or **for the return of any advances thereon.** (Contract, par. 20.) This provision alone demonstrates that the transaction is a sale and not a consignment.

7. Still claiming that the payment of the 85% of the retail list price is only an "advancement," the complainant declares: "Inasmuch as the first party bases its output and expenditures upon the **ORDERS** given by its Limited and Sub-Limited Agents, therefore, and in consideration of this contract, the third party hereby agree to arrange sales under the terms of this contract and by and in accordance with the methods herein provided, **of all the automobiles consigned and delivered to him pursuant to his orders for the same, AND FIRST**

PARTY SHALL NOT BE LIABLE TO RETURN TO THIRD PARTY HIS ADVANCES ON SAME. (Contract, par. 22.)

8. The "agent" pays all taxes levied on his stock, and upon any automobiles in his possession, OR IN TRANSIT ON BILL OF LADING OR OTHERWISE FOR DELIVERY TO HIM. (Contract, par. 23.)

9. The "agent" is compelled to purchase one of complainant's cars for use as a demonstrator, and agrees not to sell this car, **to which he is given full title**, within less than three months from the date of its purchase by him, **FOR LESS THAN THE FULL ADVERTISED LIST PRICE**, and **WITHIN HIS OWN TERRITORY**. (Contract, par. 26.)

Again we are tempted to a use of the editorial apostrophe—Can there be any doubt remaining that this contract seeks only to control prices of re-sales?

10. By the provisions of paragraph 27 of the contract, it is sought to make the innocent purchaser subject to infringement suits for violation of complainant's alleged patents, if the car which he has purchased was sold in violation of the territorial or price restrictions of the generous, liberal and just contract.

11. Still claiming that the contract is one of agency, and that the cars are merely "consigned," and not sold to the Limited and Sub-Limited

Agents, the Ford Motor Company is not compelled to retake the cars unsold at the cancellation of the contract to repay the advances made by the agent, but MAY AT ITS OPTION RETAKE POSSESSION. They may require the agent to continue for three months in an endeavor to sell the cars under the agency contract, AND IF HE IS UNABLE TO SELL THEM FOR THE COMPANY, THE COMPANY WILL SELL THEM TO HIM PERSONALLY FOR TEN PER CENTUM ADDITIONAL. (Contract, par. 47.)

The lack of a sense of sardonic humour, cannot be listed among the company's sins.

12. Throughout the contract are numerous clauses which relieve the company from any responsibility for any act of the agent, for any damages done by him, for any debts even those relating to the company's car, which he may create.

Therefore, this scheme of selling comes within the last test laid down by Mr. Justice Clarke, there is no further use remaining in the company, and no responsibility to be incurred by it.

THE CONTRACT IS ALSO VOID FOR THE REASON THAT IT IS UNENFORCEABLE AS LACKING MUTUALITY.

From beginning to the end of the contract there is no liability or obligation on the part of the company toward the agent, they do not agree to furnish any cars whatsoever, or any parts; the contract



expressly provides: "no legal liability to fill such requisitions being incurred under any circumstances." (Contract, par. 41.)

A contract similar in its lack of mutuality of promise and undertaking was construed in the case of

ELLIS vs. DODGE BROS., 237 Fed. 860.

The court said:

"This is fatal to this paper, which as will be seen from the declaration is the basis of the suit. *Morrow vs. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998; *Velie Motor Car Co. vs. Koppmeier Motor Co.*, 194 Fed. 324, 114 C. C. A. 284, *Oakland Motor Co. vs. Indiana Automobile Co.*, 201 Fed. 499, 121 C. C. A. 319. \* \* \*

"So that we come to the proposition as to whether or not there has been such performance of the contract on the part of the plaintiff as would prevent the defendant Dodge Bros., from setting up a lack of mutuality in the agreement between the parties. The agreement has the following provision:

" 'This agreement shall expire by limitation June 30, 1915, or may be cancelled by the manufacturer or dealer upon fifteen days' written notice. The termination or cancellation of this agreement will immediately act as a cancellation of all orders received from the dealer for motor cars or parts



which have not been delivered prior to the date of cancellation.'

"This provision would be fatal to this agreement, as a binding contract between the parties, if it was not otherwise objectionable. *Velie Motor Car Co. vs. Kopmeier Motor Car Co.*, *supra*; *White Co. vs. American Motor Car Co.*, 11 Ga. App. 285, 75 S. E. 345. It seems to me that, with this provision in the contract for its cancellation by either party, and without any reason given therefor, simply the right to cancel at will, it would be practically no contract at all. Even if there were an agreement here on the part of Dodge Bros. to deliver the cars, this right to cancel would seem to nullify any such agreement. To agree to do something and reserve the right to cancel the agreement at will is no agreement at all."

The court will remember a similar provision, paragraph 46, in the contract of the Ford Motor Company.

Counsel find the strongest support of their position in the cases of

BEMENT vs. NAT. HARROW CO., 186 U. S. 70, 46 L. Ed. 1059, and

HENRY vs. DICK CO., 224 U. S. 1, 56 L. Ed. 645

It is to be noted that the first of these cases arose before the period when it became apparent

that the doctrine they promulgated would result in screening attempts to create monopolies under patent licenses, and that the doctrines of the Dick case were supported by only four justices of the nine. Mr. Chief Justice White rendered a lengthy dissenting opinion, concurred in by J. J. Hughes and Lamar, the principles of which have since been concurred in by Mr. Justice Day, who did not sit in the Dick case, and find their enunciation in the Sanitary Mfg. Co. case, *supra*, and in *Bauer vs. O'Donnell*, and in the opinion, to which no dissent was filed, in *Straus vs. Am. Pub. Assn.*, and finally in *Straus vs. Victor Talking Machine Co.*, in which the entire bench concurred.

It will thus be seen that but little weight can be given to those decisions. While they have not been expressly overruled, the court has followed the practice so often observed both in courts, lawyers and laymen, of so limiting and confining the effect of mistaken expressions as to finally rob them of all significance.

For all practical purposes *Henry vs. Dick Co.*, has ceased to be the law. Such is the view evidently of Judge Hollister, expressed in

**FORD MOTOR CO. vs. UNION MOTOR SALES CO.**, 225 Fed. 373, where that learned judge had the benefit of the advice and opinion of the learned Judson Harmon, ex-Attorney General of the United States, and the equally scholarly Mr. Lucking, then, as now, of counsel for the Ford Motor Company. Although the case is a recent one,

is exhaustive on the point in issue here, although counsel, in their able, interesting and extensive brief have attempted to distinguish all cases contrary to their position, and although it involved their client, we have not been able to find a citation to it in their argument. It must have been omitted through inadvertence.

### JURISDICTION.

This court has no jurisdiction over this suit for the reason that it does not appear from the complaint that the matter in dispute between the parties exceeds the sum of \$3,000.00 exclusive the interest and costs.

The only allegations on the subject are as follows:

“The amount of the controversy between plaintiff and defendants greatly exceeds the sum of \$3,000.00.” (Abstract of Record, page 4.)

“Nor has plaintiff any means of estimating in money the damage so done to plaintiff, its agents, or the public, nor has plaintiff any means of ascertaining or determining as to how many persons will be deceived in the future by the continuance and threatened continuance of said false and fraudulent advertisements and representations, nor how many will be induced to purchase cars from said defendants by reason thereof, nor will plaintiff be able to determine in an action at law by any known measure of damages the sums of money which it

**will lose** by reason of such fraudulent and unfair method of doing business, and plaintiff therefore alleges that it has no adequate and complete remedy at law and can only obtain relief by the equitable remedy of an injunction and **accounting.**" (Abstract of Record, page 14.)

It appearing from the complaint that the plaintiff does not know and cannot ascertain how much it is or will be damaged, no jurisdictional amount is pleaded. The allegation in the 4th paragraph of the complaint does not set out that the matter in dispute LESS INTEREST AND COSTS, exceeds \$3,000.00.

MAYER vs. COHRS, 188 Fed. 443,

is in point. The plaintiff there said that the amount of his damage were peculiarly within the knowledge of the defendant. Judge Rudkin said "such averments fail to show that the jurisdictional amount is involved," and sustained a demurrer to the bill.

In,

OHMAN vs. CITY OF NEW YORK, 168  
Fed. 953, 961,

Judge Ray said: "A person may not confer jurisdiction on the Circuit Court of the United States by alleging a simple trespass and placing his damages at more than \$2,000.00 when it is perfectly apparent.

on the face of the complaint, he is entitled to nominal damages only.”

Again in,

DUPREE ET AL. vs. LEGGETTE ET AL.,  
140 Fed. 776,

the rule was stated to be:

“ ‘When it is properly before the court, the bill will be examined as required by the act of Congress 1888, and, if the jurisdictional facts do not affirmatively appear in the record, the bill will be dismissed. Bates, Fed. Equity Proceedings, par. 11, U. S. Comp. St. Tit. 13, p. 511; Act March 3, 1887, c. 373, par. 6, 24 Stat. 555; Act. Aug. 13, 1888, c. 866, par. 866, 25 Stat. 436.’ ”

“After this an amended bill and answer were filed, and the depositions taken. An examination of the original bill of 28 pages and the amended bill of 30 pages typewritten matter shows the only expression to be found setting forth the matter in dispute, exclusive of interest and costs, is on page 27 of the amended bill as follows: ‘Complainants are informed and believe that the whole of said lands, situated as they are, adjoining an incorporated town and improved as they are, are worth \$12,000 and the amount demanded by them herein is more than \$2,000.’ ”

The jurisdiction of the court being strictly statutory the words of the statutes or form prescribed

should be followed. In the prayer for relief there is nothing to aid the bill or show the amount in controversy, nor is there a demand for any amount.”  
 \* \* \* It is therefore considered, adjudged and decreed that the bill herein be dismissed, and the defendants recover their costs, to be taxed by the clerk.”

THE COMPLAINANT DOES NOT PRAY FOR AN ACCOUNTING, ASK FOR ANY MONEY JUDGMENT WHATSOEVER, OR ALLEGE THAT THE CONTRACT TRADE-NAME OR BUSINESS IS WORTH MORE THAN \$3,000.00 EXCLUSIVE OF INTEREST OR COSTS.

We cite the court to,

BATTLE vs. ATKINSON, 115 Fed. 384, 385,  
 and

WINES vs. COBB REAL ESTATE CO., 128  
 Fed. 198,

to the same effect as the authorities cited heretofore.

“The decisions of this court require that the averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments.”

BROWN vs. KEENE, 8 Peters 110, 114; also



ROBERTSON vs. CEASE, 97 U. S. 646, 648, .  
649;

ANDERSON vs. WATT, 138 U. S. 698, 702,  
703;

CONTINENTAL INS. CO. vs. RHOADS, 119  
U. S. 237, 239.

HANFORD vs. DAVIES, 163 U. S. 273, 279.

### IN CONCLUSION.

The bill must fail, and complainant denied the relief sought.

First. Because the bill does not disclose jurisdictional facts.

Second. Because the contracts to be upheld are lacking in mutuality, and are unenforceable.

Third. Because the scheme disclosed involves no facts different from those passed upon in the Dr. Miles Medical Co. case.

Fourth. Because there is no sufficient allegation of the existence of patent rights.

Fifth. Because even though devices manufactured by complainant were in fact covered by valid and subsisting patents, yet the contracts being but a cover of a scheme to fix re-sale prices, are invalid as against public policy.



Sixth. Because a court of equity will not permit itself to be used as a means of enforcing that which is unjust, inequitable and improper.

Respectfully,

LITTLEFIELD and MAGUIRE,  
Attorneys for Defendants and Respondents.